

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

LORENZO DWIGHT GORDON,	:	MOTION TO VACATE
Movant,	:	28 U.S.C. § 2255
	:	
	:	CRIMINAL ACTION NO.
v.	:	1:19-CR-114-SCJ-AJB-1
	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	1:20-CV-2952-SCJ-AJB

**UNITED STATES MAGISTRATE JUDGE’S
FINAL REPORT AND RECOMMENDATION**

Movant, Lorenzo Dwight Gordon, filed a pro se motion under 28 U.S.C. § 2255 to vacate, set aside, or correct sentence by a person in federal custody. [Doc. 57.]¹ The matter is before the Court for preliminary review of the § 2255 motion pursuant to Rule 4(b) of the Rules Governing Section 2255 Proceedings for the United States District Courts. For the reasons discussed below, the undersigned **RECOMMENDS** that the § 2255 motion be **DISMISSED** as premature.

¹ Citations to the record in this Final Report and Recommendation refer to case number 1:19-cr-114-SCJ-AJB-1.

I. Discussion

On January 27, 2020, Movant pleaded guilty to possession of a firearm by a convicted felon. [See Docs. 15, 33.] On July 8, 2020, the District Court sentenced Movant to 180 months of imprisonment, followed by five years of supervised release. [Doc. 53.] On July 10, 2020, the District Court filed the Judgment and Commitment. [Doc. 54.] Movant executed his § 2255 motion on July 7, 2020, and he mailed it on July 11, 2020. [Doc. 57 at 12-13.] Movant claims that the District Court lacked subject matter and personal jurisdiction. [*Id.* at 4-9.]

Summary dismissal of a § 2255 motion is proper “[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief” Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts.

Section 2255’s statutory construction demonstrates that § 2255 was intended to afford strictly post-conviction relief. *See* 28 U.S.C. § 2255(a), (f). First, § 2255 allows “[a] prisoner in custody under sentence of a court” to challenge that sentence, such that the statutory language itself assumes that the movant already has been sentenced. . . . Also, § 2255, and the relevant case law, instruct that the time for filing a § 2255 motion begins to run after the direct appeal process is complete, such that the statutory language suggests that pursuit of habeas relief should follow pursuit of direct-appeal relief. . . . Likewise, the reasoning cited by the courts who have held that collateral relief and direct-appeal relief cannot be pursued simultaneously, namely that the disposition of a direct appeal might

render a habeas motion unnecessary, applies with equal force to pursuing habeas relief before direct-appeal relief.

United States v. Casaran-Rivas, 311 Fed. Appx. 269, 273 (11th Cir. Feb. 11, 2009) (per curiam) (citations omitted). A § 2255 motion should be dismissed as premature if the movant can pursue a direct appeal. *Id.*²

In the present case, Movant (1) executed his § 2255 motion one day before he was sentenced, and (2) mailed his § 2255 motion three days after sentencing. Because Movant can pursue a direct appeal, his § 2255 motion should be dismissed as premature. Movant may seek § 2255 relief after pursuing a direct appeal.

II. Certificate of Appealability (COA)

Pursuant to Rule 11(a) of the Rules Governing Section 2255 Proceedings, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2).” Section 2253(c)(2) states that a certificate of appealability may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” A substantial showing of the denial of a constitutional right

² In the event that Movant does not intend to file a direct appeal, he can file another motion to vacate within the time allowed.

“includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [motion] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

When the district court denies a [motion to vacate, set aside, or correct sentence] on procedural grounds without reaching the prisoner’s underlying constitutional claim . . . a certificate of appealability should issue only when the prisoner shows both that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right *and* that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Jimenez v. Quarterman, 555 U.S. 113, 118 n.3 (2009) (citing *Slack*, 529 U.S. at 484) (internal quotation marks omitted).

A COA should be denied because the resolution of the issues presented is not debatable. If the District Court adopts this recommendation and denies a COA, Movant is advised that he “may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.” Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts.

III. Conclusion

For the reasons stated above,

IT IS RECOMMENDED that (1) the § 2255 motion, [Doc. 57], be **DISMISSED** as premature, (2) a COA be **DENIED**, and (3) civil action number 1:20-cv-2952-SCJ-AJB be **DISMISSED**.

The Clerk is **DIRECTED** to terminate the referral of the § 2255 motion to the undersigned.

IT IS SO RECOMMENDED AND DIRECTED, this 11th day of August, 2020.



ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE